NEW ZEALAND
BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Draft Financial Markets Conduct Regulations and the draft disclosure requirements

5 December 2013

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Submission by the New Zealand Bankers' Association to the Ministry of Business, Innovation and Employment on the Draft Financial Markets Conduct Regulations and the draft disclosure requirements

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fourteen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited.

Background

3. NZBA is grateful for the opportunity to submit on both the draft regulations and the proposals around disclosure. The process around the development of the Financial Markets Conduct Act 2013 (the Act) has been a good example of policy development that has actively involved the industry. NZBA commends the on-going commitment to meaningful consultation and engagement.

4. Ensuring the regime is workable is essential both for entities offering products and for those looking to use them. If the design of the regime is too onerous, product providers may choose to simply pull certain product classes, which may in the end lead to negative outcomes for the market overall.

5. This is particularly relevant in the derivatives space. Large numbers of small and medium firms currently use these products to manage their commercial risk. If it were made too onerous to offer these products, these companies are the ones that will suffer. While providers may go out of their way to accommodate large high-value clients, these smaller clients may in effect be excluded from the derivatives market, which would impair their ability to manage their risk.

6. Similarly, ensuring that the requirements around consent and oversight are practical is essential to protecting the ability for entities to provide a wide variety of products to serve the needs of their customers.

7. The following submission makes some higher level comments on both the Regulations and the draft disclosure framework.

8. If you would like to discuss any aspect of the submission further, please contact:

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Inconsistencies between the policy and the practical requirements

9. NZBA generally supports the focus of the disclosure regime on making information clear and accessible for consumers. We also believe, as recognised by MBIE, that this must be balanced against the need to ensure that sufficient information is provided to consumers.

10. In addition, we support the aim of the regime that the Product Disclosure Statement (PDS) contains static information, with more changeable information being contained in periodic disclosure documents. This approach reduces the inefficiency of undertaking repeated reviews of PDS documents to accommodate regularly changing information.

11. In light of these factors, NZBA has three comments:
    a. Some aspects of the proposed PDS documents include information which is likely to change regularly. One example is the inclusion of the risk and return indicator. This is also required to be included in the fund updates for managed investment funds and so the offeror will be required to review the indicators in the PDS on a quarterly basis. A similar issue arises for registered banks in respect of financial information, which banks are required by the Reserve Bank of New Zealand to update quarterly. The inclusion of such information will, in effect, require the PDS to also be reviewed quarterly, which would be inefficient. NZBA submits that the PDS templates should be reviewed, with any such changeable information being moved to periodic disclosure obligations instead. Our members have provided additional examples in their submissions.
    b. The disclosure templates as currently presented are relatively word heavy, which is at times in conflict with the objective of clear, concise and effective disclosure. In many cases pictures and diagrams can make the information more accessible. NZBA submits that it would be useful if this practice was expressly recognised in the guidance as an appropriate way to relay information.
    c. There is a push throughout all the documents to limit the size of the documents. While we support this generally, we believe that in the majority of cases there has to be some flexibility to produce larger documents if the nature of the offer is sufficiently complex to require a longer disclosure document. Generally speaking, the industry is not in favour of strict word limits as they are difficult to enforce. If limits are to be put in place the industry supports the use of page limits coupled with the flexibility to disclose additional information where the offer is more complex or where a failure to disclose the additional information would render the offer document misleading.

Concerns around on-going disclosure obligations

12. NZBA has a concern regarding the general reporting condition set out at clause 32 of the draft Regulations. This section requires an offeror to "disclose to the FMA all information relevant to that matter that is in the possession or under the control of the licensee or authorised body".

13. NZBA submits that the requirement to disclose information should be removed. The reason is that much of the information potentially covered by this section is either unnecessary, or where it would be useful for the FMA, can be requested under the FMA's existing information gathering powers.

14. NZBA submits that in the majority of cases notification requirements in other provisions are sufficient. For example, clause 32(2)(d) requires the licensee to report the removal or resignation of a director, senior manager or other key personnel. In such a case notification is sufficient, and it is hard to see any additional information that the FMA would consider relevant or that would assist them in their statutory purpose. In cases where additional information will be required, this can be obtained using the statutory information-gathering powers found in the Financial Markets Authority Act 2011 (the FMA Act).

15. This has the added advantages of ensuring that any information provided is covered by the protections for information sharing under the FMA Act. The FMA is subject to the Official Information Act 1982. This potentially exposes confidential information that has been provided to the FMA under the provisions in clause 32.

16. The industry also has a number of other concerns regarding the practical application of the on-going disclosure obligations:
    a. The timing of certain documents, in particular the requirements to provide account information in respect of derivatives, is impractical and will be difficult for banks to comply with. NZBA submits that MBIE extends the timeframe for the provisions of account information under clause 36 of the draft Regulations. A ten working day timeframe would better align with other regimes.
    b. There are currently inconsistencies between on-going reporting obligations between different product classes. One example is that for Managed Investment Schemes a customer has to opt in for electronic provision of information, whereas for DIMS services they have to opt out. NZBA submits that these differences are inefficient, and that the obligations should be reviewed to ensure that they align as far as possible.
    c. NZBA submits that the timeframe for confirmations under Regulation 20 should be amended to 18 months (i.e. six months after the lodgement of the financial statements). This reflects the Cabinet Paper position that any confirmation regime that is retained should be set at an 18 month review cycle.

Delegation of authority and board accountability

17. Another area where we have general concerns is the ability of governing bodies (most frequently boards) to delegate the responsibility for consenting to lodgement of documents. The Regulations do not appear to allow for due diligence or equivalent committees acting under Boards' delegation or authority to carry out this function.

18. NZBA is aware of the need to strengthen accountability in response to some of the practices that have existed in the industry in the past. However, there is a need to ensure that there is sufficient scope to allow entities to structure their affairs in a way that is practically workable. Given that the liability regime and due diligence defence established in the Act provides for Boards to delegate to these committees, NZBA submits that it is also appropriate that members of these committees can provide the consents required under the disclosure regime

19. This is particularly important in relation to the on-going requirement to update the register. In such cases the obligation to obtain Board consent is impractical, and may inhibit the ability to meet the obligation in a timely manner. It should be noted that even where the obligation is only for two directors to sign, those directors are unlikely to contemplate doing so in respect of the PDS or register without seeking Board consent. A delegated authority to a committee provides a more robust and efficient way of achieving the same outcome.

20. NZBA submits that the Regulation should be expanded to allow for this delegation by including a reference to “an agent, authorised in writing”. While this will not decrease directors’ ultimate liability for product or other disclosure documents, it will allow for a more practical process for consenting to the disclosure of information to the market. This approach would align with the approach currently taken in respect of Regulation 30 certificates. In that case the approach has proven to be a sensible solution to the issue of the quantity of documents that would otherwise have to be sent to the Board.

21. While it is the role of the Board to oversee the entity, care must be taken to ensure that the regime does not require micromanagement by the Board. In particular, in the case of the broad nature of the information to be included in the register, it may require frequent review and update. Requiring the consent by two directors to every change would not only be impractical, but also place an unreasonable requirement on offerors.

Other comments

22. NZBA would also like to make some additional comments:
    a. The ability to provide information digitally is an essential part of ensuring that the regime is future proofed. While it is clear that the regime would allow for the distribution of information electronically, NZBA submits that this should be expressly codified in the form of a safe-harbour for electronic distribution.
    b. In a number of places throughout the document there are references to information relevant to the suitability of the product. This creates unnecessary overlaps with the regulation of financial advice under the Financial Advisers Act 2008. NZBA submits that a strict demarcation must be applied between the regulation of products and the regulation of advice. As such, any references to judgments as to suitability of products should be removed to ensure that the regime does not create unnecessary confusion.

c. NZBA submits that the requirement in Schedule 1 that the offeror must ensure content of Schedule 1 disclosure document is complete should be changed to requiring the Issuer to ensure this accuracy. NZBA agrees that it is appropriate that the Crown and other equivalent issuers prepare a Schedule 1 disclosure document in respect of products they issue. However, without the suggested amendments, distributors of such products will have to also undertake due diligence on disclosure document which they neither prepared or have the ability to amend. This imposes an unnecessary additional burden, without any benefit should not be imposed here.